

APPEAL NO. 052338
FILED DECEMBER 16, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 8 and August 30, 2005, with the record closing on September 16, 2005 as the hearing officer (hearing officer 2). The disputed issues at the CCH were: (1) whether the respondent/cross-appellant (carrier A) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; and (2) whether, as a result of the decision and order of the Benefit CCH and affirmation by the Appeals Panel in Appeals Panel Decision (APD) 041201, decided July 2, 2004, does the Texas Department of Insurance, Division of Workers' Compensation (Division) have jurisdiction to determine compensability. Hearing officer 2 resolved the disputed issues by deciding that: (1) carrier A has not waived its right to contest compensability of the claimed injury in accordance with Sections 409.021 and 409.022; and (2) "[c]overage cannot be created by waiver, and since the correct carrier [carrier A] was not a party to the administrative hearing held on April 26, 2004, the Division retains jurisdiction over the issue of compensability until such time as an adjudication of the dispute is conducted pursuant to Section 410 [*sic* Chapter 410], and there has been an exhaustion of administrative remedies by the proper parties." The claimant appeals hearing officer 2's decision that carrier A did not waive its right to contest compensability. Carrier A appeals hearing officer 2's decision that the Division retains jurisdiction over the issue of compensability. Carrier A also contends that hearing officer 2 erred in not adding an issue of whether the claimant waived his right to raise an issue on carrier A's waiver of its right to contest compensability. Carrier A responded to claimant's appeal. Claimant did not file a response to carrier A's appeal.

DECISION

We reverse hearing officer 2's decision that the Division retains jurisdiction over the issue of compensability and that Carrier A did not waive its right to contest compensability of the claimed injury and render a decision that the Division does not have jurisdiction to determine the issue of compensability, including carrier A waiver, because the issue of whether the claimant sustained a compensable injury is pending in district court.

BACKGROUND INFORMATION

The claimant claimed he sustained a work-related injury to his right shoulder on (alleged date of injury), when he unhooked a trailer by pulling a pin. Many of the documents in evidence state a date of injury of (date of injury), while others state a date of injury of (alleged date of injury), but the claimant testified that the injury occurred on (alleged date of injury). On October 31, 2003, the employer sent the claimant a letter acknowledging his report of the injury and advising him that (carrier T) administers the

employer's workers' compensation claims and that his claim was under investigation by carrier T for compensability.

On October 31, 2003, the employer completed an Employer's First Report of Injury or Illness (TWCC-1).

On November 3, 2003, a person who identified himself as being with carrier T took the claimant's recorded statement.

On November 7, 2003, the Division sent the claimant an EES-41 stating that the insurance carrier for the employer is carrier A.

A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 4, 2003, states that the name of the insurance carrier is (CSS); that the insurance carrier's first written notice of injury was received on October 31, 2003; and that the "carrier" disputes the claim in its entirety, disputes an injury in the course and scope of employment, and disputes disability. This TWCC-21 was received by the Division on November 4, 2003, and reflects that a copy was mailed to the claimant.

An Employer's Wage Statement (TWCC-3) dated November 4, 2003, notes that the insurance carrier is " (first name of carrier T)".

An authorization for medical information states that the insurer/service provider is CSS and that the authorization permits the review or photocopying of the information by any representative of carrier T and/or CSS.

By letters dated December 19, 2003, (attorney W) notified " (first name of carrier T)" and the Division that she had been retained to represent the claimant in connection with his workers' compensation claim for a date of injury of (alleged date of injury).

A TWCC-21 dated December 23, 2003, names CSS as the insurance carrier, states that the insurance carrier's first written notice of injury was received on October 31, 2003; and states that the "carrier" maintains its denial of the claim, that it disputes any medical diagnosis related to a cardiac condition, and that it disputes disability.

A TWCC-21 dated December 30, 2003, names CSS as the insurance carrier, states that the insurance carrier's first written notice of injury was received on October 31, 2003; and states that the "carrier" disputes the claim in its entirety and disability.

A Division notice dated January 13, 2004, set the claim for a benefit review conference (BRC) on January 30, 2004. This notice is addressed to carrier A and to attorney W.

In a Request for BRC (TWCC-45) dated January 16, 2004, the employer stated that it requested to be notified if issues arise in the future and named carrier T-CSS as the insurance carrier.

By letters dated January 20, 2004, (attorney S) advised the Division and attorney W that carrier T had retained him to represent its interests in the claimant's workers' compensation claim. Attorney S represents carrier A in the current administrative appeal.

By letters dated January 22, 2004, the Division notified carrier A, the claimant, the employer, attorney W, and attorney S, that the BRC had been canceled because a request to cancel or reschedule had been granted.

By letters dated January 23, 2004, the Division notified carrier A, the claimant, the employer, attorney W, and attorney S that the BRC had been rescheduled to February 23, 2004.

A BRC was held on February 23, 2004. The BRC report names carrier A as the insurance carrier and attorney S as its representative, and notes that attorney W represents the claimant. The two disputed issues identified in the BRC report are: (1) whether the claimant sustained a compensable injury on (alleged date of injury); and (2) whether the claimant had disability resulting from an injury sustained on (alleged date of injury), and if so, for what period.

By letter dated February 24, 2004, attorney S's paralegal notified a medical provider that attorney S represents carrier T in the claimant's workers' compensation claim and requested claimant's medical records. By letter dated February 24, 2004, attorney S served interrogatories on attorney W and named carrier T as the insurance carrier for claimant's claim.

A Division notice dated February 26, 2004, notified the claimant, carrier A, the employer, attorney W, and attorney S that a CCH was set for April 26, 2004.

By letters dated March 1, 2004, attorney S's paralegal notified two medical providers that attorney S represents carrier T in the claimant's workers' compensation claim and requested claimant's medical records.

By letters dated March 1 and 2, 2004, attorney S named carrier T as the insurance carrier for the claimant's claim and requested the Division to issue subpoenas to several of the claimant's medical providers. The letters indicate copies were sent to attorney W.

By letter dated March 5, 2004, attorney S's paralegal notified attorney W that attorney S had been retained by CSS/carrier T to represent its interests in the claimant's claim and provided an exchange of information and documents for the CCH.

In various other correspondence regarding the claimant's workers' compensation claim dated between March 13 and April 16, 2004, to the Division or attorney W, attorney S or his paralegal named carrier T as the insurance carrier.

A Division order for attorney S's attorney fees dated March 19, 2004, reflects that a copy was sent to carrier A.

A CCH was held on April 26, 2004, with (hearing officer 1) presiding as the hearing officer. The transcript of that CCH is in evidence. The claimant, attorney W, and attorney S were present at the CCH. The disputed issues at the April 26, 2004, CCH were: (1) whether the claimant sustained a compensable injury on (alleged date of injury); and (2) whether the claimant had disability resulting from an injury sustained on (alleged date of injury), and if so, for what period. The carrier's information form was admitted at the CCH without objection and it states that the carrier's true corporate name is (carrier TI). Carrier T and carrier TI have the same first name and are undoubtedly part of the same insurance group, but the word "indemnity" instead of "insurance" in the carrier's name first appears in the carrier information form. Hearing officer 1 announced that the CCH was in the matter of the claimant versus "(combination of the names of carrier T and carrier TI)." On cross-examination of the claimant, attorney S stated that he represented "(first name of carrier T and carrier TI)."

Hearing officer 1's decision and order signed April 26, 2004, has the style of the case as claimant versus carrier TI; lists the issues as whether the claimant sustained a compensable injury on (alleged date of injury), and whether the claimant had disability resulting from an injury sustained on (alleged date of injury), and if so, for what period(s); notes that the "carrier" was represented by attorney S and the claimant was represented by attorney W; includes findings of fact that the true corporate name of the insurance carrier is carrier TI and that the carrier delivered to the claimant a document stating the true corporate name of the insurance carrier; and decides that the claimant did not sustain a compensable injury on (alleged date of injury), and that the claimant does not have disability. The order part of the decision and order determines that "Carrier is not liable for benefits and it is so ordered." There were stipulations with regard to venue and the employer, but not as to the insurance carrier.

The Division's April 29, 2004, cover letter reflects that hearing officer 1's decision and order was sent to carrier A, the claimant, the employer, attorney W, and attorney S.

The claimant appealed hearing officer 1's decision to the Appeals Panel. An attorney with attorney S's law firm filed a response naming carrier TI as the insurance carrier. In APD 041201, *supra*, the Appeals Panel affirmed hearing officer 1's decision against the claimant on the issues of compensable injury and disability, identified the claimant as the appellant and carrier TI as the respondent, and stated in the last paragraph of the decision that the true corporate name of the insurance carrier is carrier TI. As previously noted, carrier TI was identified as the carrier in the carrier information form in evidence at the 2004 CCH.

The Division's July 9, 2004, cover letter reflects that the Appeals Panel decision in the claimant's claim (APD 041201) was sent to the claimant, attorney S's law firm, an ombudsman, (carrier P), and a company with a similar name as the employer but with a different address than the employer (may be parent company). The Division's July 20,

2004, amended cover letter reflects a correction of the employer's name and address and indicates that the Appeals Panel decision in the claimant's claim (APD 041201) was sent to the claimant, attorney S's law firm, the employer, an ombudsman, and to carrier A (the amended cover letter names carrier A in the copy section with its _____ representative's name and box number).

Attorney (attorney T) filed a petition for judicial review of APD 041201, *supra*, in district court on August 6, 2004. The claimant's petition names carrier TI and carrier A as the defendants. One of the allegations in the claimant's petition is that carrier A was the insurance carrier that provided coverage to the employer and that carrier A failed to timely dispute the claimant's claim. Attorney S filed an answer to the claimant's petition for judicial review on behalf of carrier TI and carrier A. The answer alleges among other things that carrier TI is not a proper party to the lawsuit, was not a proper party to the underlying workers' compensation appeal, has no liability in the capacity in which it has been sued, and had no coverage on the alleged date of injury. The defendants' answer also alleges that the claimant's claim was timely disputed, that carrier A did not waive its right to contest compensability, and that the district court has no jurisdiction to adjudicate a waiver issue under Section 409.021 because that was not an issue at the CCH or before the Appeals Panel. According to attorney S and attorney T, the lawsuit for judicial review of APD 041201, *supra*, is presently pending before the district court.

A BRC was held on April 12, 2005. The BRC report names carrier A as the insurance carrier and attorney S and attorney (attorney PW) as carrier A's representatives. Attorney T is shown as the claimant's representative. The BRC report reflects that the two disputed issues are: (1) whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; and (2) whether, as a result of the decision and order of the Benefit CCH and affirmation by the Appeals Panel in APD 041201, *supra*, does the Division have jurisdiction to determine compensability.

A CCH was held on June 8 and continued to August 30, 2005. The disputed issues at the CCH were the two issues identified in the BRC report from the April 12, 2005, BRC. Hearing officer 2 announced that the CCH was in the matter of the claimant versus carrier A. Attorney T represented the claimant, attorney S represented carrier A, and attorney PW said he was there on behalf of CSS, who he identified as the third party administrator for carrier A. Attorney PW testified that (carrier SPT) owns CSS and that CSS is a TPA. He also testified that carrier TI did not write a policy of workers' compensation insurance for the employer. Attorney S and attorney PW represented that carrier A is the correct carrier. Hearing officer Exhibit No. 2 is the carrier information form and it states that the carrier's true corporate name is carrier A. Carrier A requested the addition of an issue on whether the claimant waived his right to raise the carrier waiver issue by not raising carrier waiver as an issue at the prior BRC and CCH when the issue of compensability was litigated. After much discussion, the hearing officer ruled that the requested issue on whether the claimant waived his right to raise the carrier waiver issue was subsumed in the second issue on jurisdiction.

Carrier A put into evidence a Claims Service Agreement by and between (carrier NUF) and its Affiliated Insurance Companies (collectively called "Insurer" in the Agreement) and CSS and its Affiliated Property-Casualty Insurance Companies (called TPA in the Agreement). The effective date of the Agreement is June 30, 2003. The Agreement states that the Insurer and its client, (called the Insured) (probably parent company of the employer) are parties to certain insurance contracts issued by the Insurer and its affiliated insurance companies pursuant to which the Insured is provided with insurance coverage for stated exposures as reflected in Exhibit A to the Agreement and that the TPA agrees to provide the Insurer with claims adjusting services for the period of June 30, 2003, to June 30, 2004. Exhibit A to the Agreement reflects that carrier A provided workers' compensation coverage in Texas for the employer between June 30, 2003, and June 30, 2004. The claimant's claimed injury date of (alleged date of injury), is within the coverage period.

There is no appeal of hearing officer 2's findings of fact that the true corporate name of the insurance carrier is carrier A and that carrier A received its first written notice of the claimed injury on October 31, 2003.

Hearing officer 2 also made the following findings of fact and conclusions of law:

FINDINGS OF FACT

- No. 4 At all times relevant to this claim, [CSS] pursuant to a Claims Service Agreement served as the [TPA] for Carrier [carrier A], and had the authority to dispute compensability in behalf of Carrier.
- No. 5 On November 4, 2003, Carrier disputed compensability of the claimed injury, which was within 60 days of its first written notice.
- No. 6 At the time of the April 26, 2004, CCH the correct Carrier [carrier A] was not a party to the dispute.

CONCLUSIONS OF LAW

- No. 3 Carrier [carrier A] has not waived its right to contest compensability of the claimed injury in accordance with Texas Labor Code Sections 409.021 and 409.022.
- No. 4 Coverage cannot be created by waiver, and since the correct carrier [carrier A] was not a party to the administrative hearing held on April 26, 2004, the Division retains jurisdiction over the issue of compensability until such time as an adjudication of the dispute is conducted pursuant to Section [sic – Chapter] 410, and there has been an exhaustion of administrative remedies by the proper parties.

The claimant appeals Findings of Fact Nos. 4 and 5 and Conclusion of Law No. 3. Carrier A appeals Finding of Fact No. 6 and Conclusion of Law No. 4.

Division records reflect that the employer had workers' compensation insurance coverage in Texas with carrier A on the claimed date of injury. The workers' compensation policy number is the same as that shown in attachment A to the Claims Service Agreement in evidence.

JURISDICTION ISSUE

With regard to the issue of whether the Division has jurisdiction to determine compensability in light of the previous CCH decision and Appeals Panel decision, hearing officer 2 wrote in the Background Information section of her decision the following:

The final disputed issue concerns whether the Division retains jurisdiction of the compensability issue, since the correct Carrier was not a party to the CCH held on April 26, 2004. As stated earlier, on April 26, 2004, [attorney S] appeared in behalf of [carrier TI], and a decision and order, which was upheld on appeal, was entered that [carrier TI] was not liable for any compensation since it was determined that Claimant did not sustain a compensable injury. Certainly, coverage may not be created by waiver or estoppel. [APD 971606, decided September 24, 1997]. What we have in the hearing officer's decision of April 26, 2004, is a decision and order that is in effect, null and void, since the proper parties were not before the hearing officer. Therefore, the Division does retain jurisdiction with regard to the compensability dispute, and such dispute remains viable until an administrative decision is entered with respect to the proper parties, the Claimant and Carrier [carrier A].

Carrier A argues that it was a party to the prior proceedings on the issues of compensability and disability; that naming carrier TI as the insurance carrier in the carrier information sheet at the CCH in 2004, was a clerical error; that carrier A was named as the carrier in the February 2004 BRC report; that the 2004 CCH decision on compensability and disability and APD 041201, *supra*, were sent to the correct carrier, carrier A; that the issue before hearing officer 2 at the 2005 CCH was not whether carrier A was a proper party to the CCH in 2004, rather the issue was whether the Division had jurisdiction to determine compensability when compensability had previously been litigated and decided at the CCH in 2004, which was appealed to the Appeals Panel, and is currently pending in district court; that the Division does not have jurisdiction to relitigate the issue of compensability because it has already been litigated; and cites Section 410.207 regarding continuation of Division jurisdiction and two court cases regarding the term "issue."

Section 410.207 provides that during judicial review of the Appeals Panel decision on any disputed issue relating to a workers' compensation claim, the Division

retains jurisdiction over all other issues related to the claim. In Texas Workers' Compensation Insurance Fund v. Texas Workers' Compensation Commission, 124 S.W.3d 813 (Tex. App.-Austin 2003, pet. denied), the court noted that in the 1989 Act the word "issue" is used to refer to disputed matters related to the underlying workers' compensation claim.

A situation somewhat similar to the one under review occurred over the course of several CCHs and Appeals Panel decisions as set out in APD 020071, decided February 28, 2002; APD 020940, decided June 10, 2002; and APD 030983, decided June 13, 2003. That situation proceeded as follows:

1. A hearing officer determined that a claimant was not injured in the course and scope of employment and did not have disability and the claimant appealed. In APD 020071, *supra*, the Appeals Panel reversed and remanded for clarification as to the identity of the carrier, noting that if the proper carrier was not before the Division as a party to the claim, the hearing officer should take appropriate action. The Appeals Panel noted that at the beginning of the CCH, the parties indicated that they agreed that the carrier was a certified self-insured and that the carrier information form showed the employer as the carrier. However, the Appeals Panel noted that the records of the Division did not show that the employer was approved for self-insurance.
2. On remand, the hearing officer determined that the employer was insured by an insurance company and was not self-insured, but canceled the remand hearing and issued essentially the same decision substituting the name of the carrier. The claimant appealed. In APD 020940, *supra*, the Appeals Panel noted that the employer and the carrier are not "one and the same;" that due process requires that a carrier that is potentially liable for benefits to be afforded notice of and the right to appear in a CCH; that a claimant is entitled to raise arguments and defenses that he or she may have against a belatedly discovered carrier; and that the carrier's argument that the claimant was not deprived of a fair hearing because the name of the insurance company was on the BRC report was specious under the totality of the facts and continuing representations made in the record concerning the self-insured status of the employer. The Appeals Panel further noted that a carrier's failure to pay or dispute compensability under Section 409.021 may result in waiver of the dispute and that when the insurance company is not expressly made a party to the proceeding until named in the remand decision, the claimant was deprived of the opportunity to raise such arguments at the BRC or CCH, and that the omission of an essential party is not cured because the missing party, after a favorable decision has been rendered, hires the same attorney that represented the nonparty. The Appeals Panel stated that "[B]ecause of harmful error in failing to join the insurance company as a party in a reconvened CCH, and our inability to remand a second time (Section

410.203(c)), the Appeals Panel reverses and renders a new decision that there has been no binding adjudication of the dispute with the proper carrier present, and the decision and order is null and void, and has no precedential effect.”

3. A different hearing officer presided at a subsequent CCH and determined that the claimant sustained a compensable injury and had disability; that the carrier provided workers’ compensation insurance for the employer on the date of injury; that the Division has jurisdiction to determine the disputed issues; that the principles of res judicata, laches, and collateral estoppel do not act as a bar to the claimant on the disputed issues; and that the carrier waived its right to dispute compensability of the claim. The carrier appealed. In APD 030983, *supra*, the Appeals Panel affirmed the hearing officer’s decision. In discussing the case, the Appeals Panel noted that the carrier had filed a petition in district court seeking to set aside the decision in APD 020940, *supra*. The Appeals Panel noted that the carrier’s suit to set aside APD 020940, *supra*, was not an impediment to the Division’s jurisdiction to determine the issues of compensability and disability because the decision in APD 020940, *supra*, that the first hearing officer’s decision was null and void remained binding during the pendency of the appeal on judicial review, citing Section 410.205(b).

While there are similarities between the above factual situation and the case under review, a major distinguishing point is that in the instant case, the Appeals Panel decision that is pending before the district court, APD 041201, *supra*, determined that the claimant did not sustain a compensable injury and did not have disability and it is that Appeals Panel decision that remains binding under Section 410.205(b) during the pendency of the appeal on judicial review, whereas in APD 030983, *supra*, which determined that the Division did have jurisdiction to determine compensability despite the previous CCH decision on compensability, the Appeals Panel decision that was pending before the district court on judicial review, APD 020940, *supra*, had determined that the prior CCH decision determining a noncompensable injury was null and void and it was that Appeals Panel decision that remained binding during judicial review. In other words, we do not have in the instant case an Appeals Panel decision on judicial review that renders a decision that the prior CCH decision was null and void, rather we have an Appeals Panel decision on judicial review that affirms the prior CCH decision that the claimant did not sustain a compensable injury. Consequently, the decision in APD 041201, *supra*, that the claimant did not sustain a compensable injury remains binding during the pendency of the appeal for judicial review and the Division does not have jurisdiction to determine the compensability of the claimant’s claimed injury because that issue is pending in district court. We note that both carrier T and carrier A are defendants in the pending suit by the claimant to set aside APD 041201, *supra*. We reverse the hearing officer’s decision that the Division retains jurisdiction over the issue of compensability and render a decision that the Division does not have jurisdiction over the issue of compensability because that issue is pending in district court in a suit for judicial review of APD 041201, *supra*.

WAIVER ISSUE

The claimant contends that hearing officer 2 erred in determining that carrier A did not waive its right to contest compensability of the injury. Carrier A contends that hearing officer 2 erred in denying its request to add an issue on whether the claimant waived his right to raise an issue on whether Carrier A waived its right to dispute compensability. Having determined that the Division does not have jurisdiction to determine the issue of compensability because the issue of compensable injury is pending before the district court, and both carrier TI and Carrier A are before the district court, it follows that the Division does not have jurisdiction to determine compensability by operation of carrier A waiver because the decision in APD 041201, *supra*, that the claimant did not sustain a compensable injury is binding during the pendency of the appeal to district court.

We reverse the hearing officer's decision on the issues of jurisdiction and carrier waiver and render a decision that the Division does not have jurisdiction to determine the issue of compensability, including carrier A waiver, because the issue of whether the claimant sustained a compensable injury is pending before the district court and the decision in APD 041201, *supra*, that the claimant did not sustain a compensable injury is binding during the pendency of the court appeal.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
_____, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge